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No. 81-84

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

BEN BUNDO, JR. and BEN BUNDO, SR.,
Appellants,

vs.

MICHIGAN LIQUOR CONTROL COMMISSION,
Appellee.

On Direct Appeal From The Supreme Court of Michigan

ANSWER TO MOTION TO DISMISS OR AFFIRM

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NOW COMES BEN BUNDO, JR. and BEN BUNDO, SR., Appellants herein, by and through RABETTE & O'DEA, P.C., their attorney of record in the within direct appeal from the Michigan Supreme Court, and submit their Answer to Motion to Dismiss or Affirm, stating in substance that said direct appeal presents substantial federal questions which are not clearly controlled by any dispositive decisions of this Court.

STATEMENT OF THE CASE

In October 1977, the Michigan Liquor Control Commission's regulation 436.37, which banned bottomless dancing in licensed establishments, became effective, thereby forbidding a form of entertainment Appellants had

offered for at least three (3) years prior to October, 1977. In an effort to challenge the constitutionality of the regulations, the Appellants did not cease offering bottomless dancing and were, accordingly, cited on November 29, 1977 for allowing three female dancers to dance nude in their place of business. This violation resulted in a complaint being issued against the Appellants on Docember 14, 1977 and, subsequently, a hearing was held on January 30, 1978. At this stage of the proceeding, Appellants raised freedom of expression and equal protection challenges to Rule 436.37. Based on the hearing held on January 30, 1978, the Michigan Liquor Control Commission, on February 8, 1978, issued an opinion that declared the rules in question constitutionally valid and, therefore, revoked Appellants' liquor license and fined Appellants Nine Hundred ($900.00) Dollars. Subsequently, Appellants sought review of the aforementioned decision, which was had in front of the Hearings and Appeals Section of the Liquor Control Commission on August 8, 1978. At this review, Appellants again raised freedom of expression and equal protection challenges to Rule 436.37 and also raised equal protection and due process challenges to the punishment imposed upon Appellants for one violation of Rule 436.37. The Board issued its opinion on August 22, 1978, wherein it affirmed the Commission's earlier findings and ordered the Appellants' liquor license and liquor supplies be confiscated on September 25, 1978.

On September 21, 1978, the Appellants filed a Complaint for Writ of Superintending Control in the Circuit Court for the County of Ingham, at which time the Liquor Control Commission stipulated to a Preliminary Restraining Order Pente Lite. On February 20, 1978, the Honorable Robert Holmes Bell, Circuit Judge for the County of Ingham, denied Appellants' Application for a Writ of Super-

intending Control, holding that the findings of fact of the Liquor Control Commission were supported by competent, material and substantial evidence on the whole record, that the regulation in question was valid and constitutional and that Appellants' claims were without merit.

Following this denial, Appellants filed a Claim of Appeal, Petition for Order to Show Cause and Temporary Restraining Order with the Michigan Court of Appeals on March 12, 1979. On March 13, 1979, acting upon their decision of August 22, 1978, the Michigan Liquor Control Commission confiscated Appellants' liquor license and supplies. On March 29, 1979, the Michigan Court of Appeals issued an order restraining the Michigan Liquor Control Commission from enforcing their license revocation order and, in addition, restraining the Appellants from offering entertainment proscribed by the Michigan Liquor Control Commission Rule 436.37. On April 12, 1978, the Michigan Court of Appeals, on their own motion, revoked the order entered on March 29, 1979. In response to said Order, Appellants submitted a Petition for Re-hearing and a brief in support thereof. Despite the fact that this Petition was not opposed by the Michigan Liquor Control Commission, the Michigan Court of Appeals denied Appellants' application for re-hearing for lack of merit in the grounds presented.

On August 3, 1979, Appellants filed their brief on appeal in the Michigan Court of Appeals, raising the same constitutional challenges to both the rule and the punishment as were argued in the Court and administrative hearings below. On April 9, 1980, the Michigan Court of Appeals affirmed the Ingham County Circuit Court's denial of the Writ of Superintending Control and the Michigan Liquor Control Commission's ruling that Appellants had

violated Rule 436.37 (1) of the Michigan Liquor Control Commission, finding that the decision was supported by competent, material and substantial evidence on the whole record and that the constitutional arguments had already been decided in *Bundo* v. *Liquor Control Commission,* 92 Mich App 20 (1979).

On April 26, 1980, Appellants filed an Application for Leave to Appeal to the Michigan Supreme Court and on April 15, 1981, the Michigan Supreme Court denied Appellants' Application for Leave to Appeal.

The Appellants now take this Appeal to the United States Supreme Court from the above Judgments.

ARGUMENT

The Motion to Affirm or Dismiss presented to this Court by Appellee, Michigan Liquor Control Commission, entirely ignores the following substantial federal questions which Appellants have identified in their Jurisdictional Statement at page i:

Issue 4.

WHETHER THE ACTIONS OF THE MICHIGAN LIQUOR CONTROL COMMISSION IN PENALIZING APPELLANTS BY REVOKING THEIR LIQUOR LICENSE FOR ONE VIOLATION OF RULE 436.37 WAS UNREASONABLE, ARBITRARY AND CAPRICIOUS THEREBY DENYING APPELLANTS DUE PROCESS OF LAW IN VIOLATION OF APPELLANTS' RIGHTS GUARANTEED THEM UNDER THE UNITED STATES CONSTITUTION.

Issue 5.

WHETHER APPELLANTS HAVE BEEN DEPRIVED OF THEIR RIGHT TO EQUAL PROTECTION OF THE LAW AS GUARANTEED THEM BY THE UNITED STATES CONSTITUTION BY THE MICHIGAN LIQUOR CONTROL COMMISSION'S ACTIONS IN PENALIZING APPELLANTS BY REVOKING THEIR LIQUOR LICENSE FOR ONE VIOLATION OF RULE 436.37 WHILE PENALIZING OTHER LIQUOR LICENSEES WITHIN THE STATE OF MICHIGAN FOR VIOLATION OF RULE 436.37 WITH SHORT TERM SUSPENSIONS OF THEIR LIQUOR LICENSES AND SMALL FINES.

Each of these two issues raises questions of fundamental fairness in the application of a license revocation penalty to the relatively innocuous facts in this particular case, taken individually and when compared to other similar cases which, on similar or more aggravated facts, did not result in license revocation.

In addition, it is Appellants' position that those United States Supreme Court Cases cited by Appellee are distinguishable on the facts of each case. In *California* v. *LaRue*, 409 US 109; 93 S Ct 390; 34 L Ed 2d 342 (1972) reh. den. 410 US 948; 93 S Ct 1351; 35 L Ed 2d 615 (1973), a declaratory judgment action was instituted by certain liquor license holders and dancers performing at their premises, against the California Department of Alcoholic Beverage Control, the State of California and various state officials, challenging the constitutionality of regulations promulgated by the Department which prohibited the performance of specified acts prohibited by law, touch-

ing or fondling of breasts or genitals, displaying of genitals and displaying films or pictures depicting such prohibited acts in licensed bars or nightclubs. The Department had conducted in-depth hearings and taken extensive testimony relating to a relationship to exist in this locality between topless and bottomless entertainment offered at licensed bars and nightclubs and certain sex-related crimes. The Court stated that:

> "The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication." (At 118, emphasis added)
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> ". . . [I]n licensed establishments where 'topless' and 'bottomless' dancers, nude entertainers and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with women entertainers: customers engaged in public masturbation: and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.: (at 111)
>
> ". . . we would poorly serve both the interest for which the State may validly seek vindication and the interest protected by the First and Fourteenth Amendments were we to insist that *the sort of bacchanalian revelries that the Department sought to prevent* by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theatre." (at 118, emphasis added).

LaRue held only that California had the right to regulate and prohibit nude performances which had degenerated into the type of gross sexuality described in detail in *LaRue,* not that the State may validly prohibit all nude performances in bars.

In the case at hand, there has been no allegation that "bacchanalian revelries" of the sort described in *LaRue* had taken place in Appellants' establishment. Indeed, Appellants were cited on November 29, 1977 only for allowing three female dancers to dance nude, which resulted in a complaint being issued against Appellants on December 14, 1977.

Also, in the recent case of *New York State Liquor Authority* v. *Ballanca,* — US —, 49 USLW 3950 (No. 80-813, June 22, 1981), the United States Supreme Court upheld a New York State Statute prohibiting topless dancing in an establishment licensed by the State to serve liquor citing the *LaRue* case, supra at 118, where it was stated that such statutes must be given an "added presumption in favor of the State regulation" conferred by the Twenty First Amendment. However, even in the *Bellanca* case, supra, an important fact distinguishes it from the case at bar; that is, in *Bellanca,* the statute under constitutional attack did not provide for criminal penalties while in the case at bar, criminal penalties have been provided for Appellants exercise of First Amendment activities prohibited under the rule.

Thus, it can be seen that the United States Supreme Court cases cited by Appellee, Michigan Liquor Control Commission, are distinguishable from the present case upon their facts and thus the present direct appeal presents substantial Federal Questions which are not clearly controlled by any dispositive decisions of this Honorable Court.

RELIEF REQUESTED

WHEREFORE, it is prayed that the United States Supreme Court deny the Motion of Appellee to Dismiss or Affirm.

Respectfully submitted,

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